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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1018

GLENN HICKMAN AND ANTHONY ROCK,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS

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PRIOR OPINIONS

On November 18, 1974, the Supreme Court of Illinois filed its Opinion affirming the decision of the Appellate Court of Illinois, Third District rendered on June 8, 1973. The latter decision reversed the trial court's order of September 14, 1971, arresting the judgments against both of the petitioners who had been found guilty by a jury of felony-murder on February 5, 1971.

The decision of the Supreme Court of Illinois is reported at ..... Ill. 2d ....., 319 N. E. 2d 511. The decision of the Appellate Court, Third District, is reported at 12 Ill. App. 3d 412, 297 N. E. 2d 582. Both opinions are set forth fully in the appendix to this Petition.

No petition for rehearing was requested of the Supreme Court of Illinois, it being obvious that rehearing would be a useless act. The Mandate of the Supreme Court was issued on December 11, 1974, recalled on December 17, 1974 and reissued on January 23, 1975. On February 4, 1975, proceedings consistent with the Opinion of Supreme Court of Illinois were held in the trial court preparatory to the sentencing of the Petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioners contend that the Equal Protection Clause of the 14th Amendment to the Constitution of the United States has been violated:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

The Illinois Statutory provisions involved are found in Chapter 38 of the Illinois Revised Statutes, and read as follows:

> Section 9-1 Murder.) (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter.

Section 5-2. When Accountability Exists.] A person is legally accountable for the conduct of another when:

(a) Having a mental state described by the statute defining the offense, he causes another to perform the conduct, and the other person in fact or by reason of legal incapacity lacks such a mental state; or

(b) The statute defining the offense makes him so accountable; or

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. However, a person is not so accountable, unless the statute defining the offense provides otherwise, if:

(1) He is a victim of the offense committed; or,

(2) The offense is so defined that his conduct was inevitably incident to its commission; or,

(3) Before the commission of the offense, he terminates his effort to promote or facilitate such commission, and does one of the following: wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.

Section 1-3. Applicability of Common Law.] No conduct constitutes an offense unless it is described as an offense in this Code or in another statute of this State. However, this provision does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, civil judgment, or decree.

QUESTIONS PRESENTED

1. Does Chapter 38, Section 9-1, Illinois Revised Statutes, insofar as it applies to felony-murder cases, as interpreted by the Supreme Court of Illinois, deny to these petitioners the equal

protection of the laws in that by their interpretation the Illinois Courts have removed as elements necessary for proof of guilt in all other instances of criminal responsibility.

2. Is Illinois' position concerning the imposition of criminal responsibility upon a person who is accused of murder under a felony-murder theory when the activity that caused death was performed by a person not in confederation with the accused and in opposition to the accused a violation of the equal protection clause because of its wide divergence from the vast majority of other states.

JURISDICTIONAL STATEMENT

This cause is before the Court under the provisions of Rule 19-1(a) in that the Supreme Court of Illinois had, by its decision, denied these petitioners the equal protection of the laws by causing them to be charged with criminal responsibility under a theory of responsibility not imposed upon any other type of criminal defendant.

STATEMENT OF FACTS

The Appellate Court of Illinois, in its decision, stated the facts accurately. They are as follows:

> "The factual situation which resulted in the trial of the defendants occurred on the evening of April 2, 1970, at which time seventeen policemen from the police force of the City of Joliet were participating in a surveillance of a building known as the Illinois Wine and Liquor Warehouse. Among the officers involved in the surveillance was Sergeant James Cronk, who shortly before 10:15 P. M. noticed Robert Bruce Papes and the defendant, Anthony Rock pass by the warehouse several times in a Cadillac automobile. Later several officers saw a Chevrolet automobile enter an alley south of the warehouse and stop at a side door of the building. Several people left the automobile and disappeared from sight into the doorway. The driver of this vehicle, who was Papes, walked a short distance,

made a surveiliance of the area, returned to the automobile and then drove out of the sight of the officers. After several minutes Papes was again seen walking in the alley and after once more looking over the area he again disappeared from the sight of the police officers when he went to the location of the side doorway of the warehouse. It was within a matter of a few seconds of Papes' disappearance that Sergeant Cronk saw three individuals exit from the side doorway of the warehouse, at which time he signalled the officers to close in from various directions towards a concrete parking lot which was to the rear and west of the warehouse."

"Papes and the defendants, Rock and Hickman, upon seeing the officers approaching them, proceeded to run. Papes ran in a southwesterly direction and the Defendants, Rock and Hickman in a northwesterly direction towards some bushes located at the northwest corner of the parking lot. Papes was apprehended when a Sergeant Erwin pointed a shotgun at him. Papes submitted to an arrest and upon his person was found a loaded pistol and additional cartridges. As the defendant, Rock, was running he was carrying a small object in his hand. The defendant, Hickman, was carrying an attache case as he was fleeing."

"The defendants, Rock and Hickman, ran through the bushes while in the meantime Sergeant Cronk ran to the rear of the warehouse where he noticed two people running in a northwesterly direction. Sergeant Cronk yelled 'halt—police' several times but his commands were ignored. He lost sight of the two fleeing individuals but within seconds thereafter saw a man carrying a handgun running towards the bushes at the northwest corner of the parking lot. Sergeant Cronk, believing that this approaching individual was one of the burglars of the Illinois Wine and Liquor Warehouse, and referring to the handgun, ordered the person to 'drop it.' When there was no compliance to this warning Sergeant Cronk, believing that this approaching individual was one of the burglars of the Illinois Wine and Liquor Warehouse, and referring to the handgun, ordered the person to 'drop it.' When there was no compliance to this warning Sergeant Cronk fired his shotgun

at the individual, who was later discovered to be Detective William Loscheider of the Joliet police force. Loscheider was killed by this shot from his fellow officer's gun."

"Approximately one-half hour later the defendants Rock and Hickman were arrested as they were walking on a street approximately two and a half blocks from the warehouse. Neither of the defendants had a weapon on his person."

"Subsequent to the fatal shooting of Loscheider the police officers discovered that entry to the warehouse had been made by removing a panel from the side door and also by removal of the lock from the door."

"During the trial of the defendants an analyst from the Illinois Bureau of Identification Crime Laboratory testified that the tool marks found on the side door of the warehouse were made by a screwdriver found in an attache case which was discovered on the parking lot to the rear of the warehouse."

"During the course of the trial the court struck from the murder count of the indictment as to the defendants, Rock and Hickman, all allegations as to the defendants arming themselves in furtherance of a conspiracy to burglarize the Illinois Wine and Liquor Warehouse."

ARGUMENT

The Illinois Supreme Court's Opinion in This Case Discriminates Against These Petitioners in That They Are Convicted by Reason of the Acts of Persons Not in Any Way Connected with or Confederating with Them, While All Other Illinois Defendants Have Their Own Actions as the Basis for Criminal Responsibility.

The petitioners asked the Supreme Court of Illinois to consider the Illinois felony-murder statute in a logical manner, consistent with the way all other criminal defendants are judged; that is to require both an act and an intent which the laws of responsibility ascribe to the defendant. This the Illinois Supreme Court refused to do. The Court not only adopted the

time-honored function of the felony-murder rule to substitute intent but it also did away with the requirement that the defendant commit an act for which the law says he is responsible.

This posture adopted by the Illinois Court in the opinion here questioned is at variance with the historical and analytical roots of the felony-murder rule. Under the common law, in order for a person to be held responsible for murder, he had to be proved to have had malice aforethought. If a felon accidentally or unintentionally killed someone while committing a felony, it might be difficult or impossible for the State to prove the malice necessary for a murder conviction. To eliminate the need to prove malice in this situation, the felony-murder rule developed, whereby the malice of the underlying felony was deemed in law to be transferred to the homicidal act, rendering it murder. It was the malice of the underlying felony which was imputed to the defendant in his homicidal act. See Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 106 Pa. Law Rev. 51 (1958) and Hitchler, *The Killer and His Victim in Felony-Murder Cases*, 53 Dickinson L. Rev. 3 (1948). If he perpetrated the homicidal act himself, no act done by another person needed to be imputed to him to hold him liable for murder. The Illinois Supreme Court recognized the origin of the felony-murder rule, when it said, with regard to the rule:

> "Murder" is the unlawful killing of another with malice aforethought. "Malice aforethought" is shown where the killing results from an act done with intent to commit a felony where the commission of such felony is likely to cause the death of another person. This was the common law rule. (*People* v. *Goldvarg*, 346 Ill. 398, 401, 178 N. E. 892, 893 (1931).)

The present Illinois statutory scheme reflects the same analysis. Ill. Rev. Stat., Chapter 38, Section 9-1(a), reads:

> A person who kills an individual without lawful justification commits murder, if, in performing the acts which cause the death:

(A) He either intends to kill or do great bodily harm to that individual . . .

Subsection (1) thus contains a requirement of intent. Subsection (3), the felony-murder rule, removes the necessity of proving intent to kill, if the person accused "is attempting or committing a forcible felony other than voluntary manslaughter."

The felony-murder rule developed as a doctrine imputing *intent*, not as a doctrine imputing *action* of one person to another. The responsibility of one person for the actions of another was a result of a different doctrine. Under the rule of accountability for the acts of another, a defendant could be held accountable for the acts of a co-felon done in furtherance of the felony. This doctrine was early recognized in Illinois in *Brennan* v. *People*, 15 Ill. 511, 515 (1854): ". . . the jury might infer that all were engaged in one common object. And if that object was to take the life of Story, then all concerned were equally guilty of the homicide." It was by a combination of these two rules (the felony-murder rule and the rule of accountability) that a person could be held liable for murder if his co-felon killed someone in furtherance of the felony: "It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story; and that he was killed in the attempt to execute the common purpose." *Brennan* v. *People*, 15 Ill. 511, 516 (1854). Logically, there is a two-step analysis: First, the felony-murder rule transfers the co-felon's own homicidal act, so that his act is murder. Second, by operation of the separate principle of accountability, the responsibility for the co-felon's felony-murder is also imposed on the defendant if the co-felon was acting in furtherance of the felony.

Before a defendant can be convicted of felony-murder based on the homicidal acts of another, two essential elements must be present; the fatal act must have been done in furtherance of

the felony, and it must have been done by one of the defendant's co-felons. Neither test is met in the undisputed facts at bar.

If the fatal act is done by an intervening person acting in opposition to the felony, again neither element is present. Where the defendant is held accountable for a co-felon's acts, he is only accountable for those acts done in furtherance of the felony, which is not the case when an intervening party acts in *opposition* to the felony. Moreover, the accountability rule is one which imposes liability for an act of a co-felon only, and not for the acts of other persons intervening in opposition. Thus it is clear that under the traditional application of the two rules involved, the felony-murder rule could not operate to make a defendant liable for the homicidal acts of a police officer acting in opposition to the felony.

The very precise wording of the Illinois felony-murder statute comports with the traditional application of the rule at common law. Illinois Revised Statutes, Chapter 38, Section 9-1(a)(3) reads as follows:

> A person who kills an individual without lawful justification commits murder, if in performing the acts which cause the death: he is attempting or committing a forcible felony other than voluntary manslaughter.

The wording of the statute makes it clear that the "person who kills," or performs "the acts which cause death," must be the *same person* as the one who is "attempting or committing a forcible felony" before liability for murder can be imposed under this subsection. If it is the same person, co-felons may also be accountable under the provisions of Chapter 38, Section 5-2, relating to responsibility for the conduct of another. But the statute makes no provision for a murder charge where the person who kills is acting in opposition to the felony, rather than committing it. It specifically limits the offense to situations where the person who kills is one of the felons. And, under

Section 1-3: "No conduct constitutes an offense unless it is described as an offense in this Code or in another statute of this State."

It is difficult to see how it could be any clearer that the precisely worded felony-murder statute does not define the conduct of the petitioners or of Sgt. Cronk who did the killing as an offense—the petitioners because they were not the "person who kills," and Sgt. Cronk because, in performing the fatal acts, he was not "committing a felony." Certainly, then, the Officer's conduct would not be the basis for holding the petitioners criminally responsible for the *conduct of another* under Section 5-2(c):

> A person is legally accountable for the conduct of another when:
>
> (c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

It is clear that the interpretation given by the Illinois Courts try to avoid the prohibition of Section 1-3 (no conduct is an offense unless the Code so provides) by placing an unwarranted gloss on the felony-murder statute where that statute's plain wording will not suport it. A gloss of constitutional proportions since no other criminal defendant is subjected to criminal responsibility without conforming to Section 5-2(c).

Under Section 1-3, no person is held accountable, other than when Section 5-2 says he is. The felony-murder statute, Section 9-1(a)(3), does not purport to define the responsibility of one person for conduct of another. In fact, by its terms it applies only to the conduct of a single person. A person other than the actor may certainly be responsible for the actor's felony-murder, but only within the terms of Section 5-2. Section 5-2 does not hold petitioners responsible for the conduct of Sgt. Cronk, who

shot and killed Officer Loscheider. In fact, neither statute can be the basis for liability in this case.

The foregoing analysis demonstrates vividly that the petitioners have been treated by the Illinois Supreme and Appellate Courts in a manner different than all other criminal defendants and this different treatment is a violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Petitioners, on this showing, respectfully request that a Writ of Certiorari issue to the Supreme Court of Illinois and that this Honorable Court review in depth the decision of that Court.

Illinois' Application of the Felony-Murder Rule Under the Circumstances Presented in This Case Violates Petitioners' Rights Under the Equal Protection Clause Since Illinois Felony-Murder Defendants Are Treated Differently Than Those in Other States.

Other jurisdictions have also considered the question whether a felon should be liable for the homicidal acts of non-felons resisting the felony. No state court of last resort which has considered the question presently holds that there should be such liability. Extensive search has not located a single case in which any state has definitively ruled as the Illinois Supreme Court's opinion now provides.

All scholarly discussions of the felony-murder rule in the United States begin with a much criticized Pennsylvania decision and so shall Petitioners. *Commonwealth* v. *Almeida*, 362 Pa. 596, 68 A. 2d 595 (1949) involved a situation where a policeman was slain by another policeman as they both were attempting to subdue robbers. The robbers were charged with murder, and their conviction upheld on the theory that they were the proximate cause of the killing and should be responsible for the events which their conduct set off. The case was subject to much scholarly criticism, including Morris, *The Felon's Re-*

sponsibility for the Lethal Acts of Others, 105 U. Pa. L. Rev. 51 (1958). *Almeida* was partially overruled by *Commonwealth* v. *Redline,* 391 Pa. 486, 137 A. 2d 472 (1958) where it was held that the rule of *Almeida* did not apply when an innocent party killed a felon. The Court's reasoning in *Redline* went further and would have applied even if an innocent person had been killed, for the Court relied on the common law doctrine that the killing had to be done by a felon in furtherance of the felony. However, the Court specifically declined to go that far because such a factual situation was not before it; the Court reserved that question. Finally, in *Commonwealth ex rel. Smith* v. *Myers,* 438 Pa. 218, 261 A. 2d 550 (1970), the Pennsylvania Court explicitly held that the act of killing must be done by the defendant or an accomplice, with the single exception where one of the felons uses an innocent victim as a shield for escape.

The case in which California lays down the general rule is *People* v. *Washington,* 62 Cal. 777, 402 P. 2d 130, 44 Cal. Reptr. 442 (1965). There the defendant's companion in a robbery was fatally injured by the victim. The California Court reversed Washington's murder conviction because the fatal act was not committed by a felon, and therefore could not have been done in furtherance of the felony. 44 Cal. Reptr. at 445. The Court specifically rejected a view that would impose liability only if a non-felon were killed, which is the view now urged by the State.

In the same case, the Court delineated an exception to the rule that one is not reasponsible for the lethal acts of others —when one initiates a gun battle and the victims resist and kill. The court did not even regard the felony-murder rule as applying in such a case, but would have imposed liability on other grounds. Thus *Washington* recognized the possibility of liability of lethal acts of others in the limited situation where a defendant starts a gun battle, but the case still adheres to the traditional view that under the felony-murder rule there is no liability for the acts of non-felons.

People v. *Gilbert*, 63 Cal. 2d 690, 408 P. 2d 365, 47 Cal. Reptr. 909 (1965) is the next case in line and there the California Supreme Court dealt with another gun battle case. Police interrupted a bank robbery, and one of the defendants shot and killed a policeman; police in response shot and killed one of the defendants. The Court said that the remaining defendants would be liable for murder of the co-felon killed by the policeman only if they initiated the gun battle and the police shot in response to that shooting. The Court did not rest its decision on the felony-murder rule, which imputes malice, but imputed the killing itself to the act of the defendants. 47 Cal. Reptr. at 917-918. Thus the Court left intact the general rule laid down in *Washington* that there is no liability for the acts of non-felons under the felony-murder rule.

Taylor v. *Superior Court of Alameida*, 3 Cal. 3d 578, 477 P. 2d 131, 91 Cal. Reptr. 275 (1970) is another case where the California Court expanded its definition of "initiating" a gun battle to acts which were sufficiently provocative to cause lethal resistance, even though the felons stopped short of actually firing first. During a robbery the co-felons made repeated threats to kill the victims immediately, and in response one of the victims pulled out a gun. There followed a big gun battle and one of the felons was killed by the robbery victim. In sustaining the charge of murder, the court enlarged the *Gilbert* exception to the *Washington* rule, but it did not overrule *Washington*. Thus, California is in a position similar to Pennsylvania, with the "shield" exception to the general rule that no one is responsible for the lethal acts of non-felons. California's exception because of the expansion in *Taylor*, but the general rule remains as at common law in both states, and a felon is not responsible for the lethal acts of third parties.

In *Commonwealth* v. *Balliro*, 349 Mass. 505, 209 N. E. 2d 308 (1965) the trial court instructed the jury that it was immaterial whether the felon or the police fired the fatal shots. That instruction was held to be reversible error:

"The felony-murder rule as it was formulated in England was a doctrine of constructive malice. To make out a case of murder it was necessary only to establish that the defendant had committed a homicide while engaged in the commission of a felony. No other evidence had to be introduced to prove the essential element of malice aforethought. 3 Coke Institutes. 52 Foster, Crown Cases and Crown Law, 258 (3rd Ed.). I Hale P. C. 465. This was the only function which the rule performed; it obviated the necessity of establishing malice aforethought by other means. See Royal Commission on Capital Punishment, Report 25-33; Morris, the Felon's Responsibility for the Lethal Acts of Others 105 U. of Pa., Law Rev. 50. This Court has applied the felony-murder rule only in this limited fashion. . . .

"The Commonwealth now urges, however, that we should give this rule an entirely new construction so that a killing by a police officer in resisting the commission of a felony is to be imputed to those committing the felony. This we expressly declined to do in *Commonwealth* v. *Campbell,* 7 Allen, 541 . . . We think that the same rule of law should apply in situations where an innocent person is killed as those in where a felon is the victim. 'A distinction based on the person killed . . . would make the defendant's criminal liability turn upon the marksmanship of victims and policemen. A rule of law cannot be based on such a fortuitous circumstance' . . . The basic question is whether a felon can be held criminally liable for the death of any person killed by someone resisting the commission of a felony. We hold that he cannot be." (209 N. E. 2d at 312-14.)

In *People* v. *Austin,* 370 Mich. 12, 120 N. W. 2d 766 (1963) defendant was charged with the murder of his accomplice when the intended robbery victim intentionally shot and killed the accomplice. In spite of a Michigan decision which had followed the Pennsylvania case of *Commonwealth* v. *Almeida, supra* (*People* v. *Podolski,* 332 Mich. 508, 52 N. W. 2d 201 (1952)), the *Austin* Court dismissed the charge, preferring to following *Commonwealth* v. *Redline, supra.*

It should also be noted, in line with the *Austin* reasoning, that a recent Michigan case rejected the tort concept of proximate cause in a "misdemeanor-manslaughter" case, and held that before liability will be imposed for a homicide in such a situation, the fatal act must be that of the defendant. In that case, *People* v. *Scott*, 29 Mich. App. 549, 185 N. W. 2d 576 (1971), the defendant was engaged in a traffic violation and the police pursued him. During the chase a police car collided with a bus and a policeman was killed in the accident.

In *People* v. *Wood*, 8 N. Y. 2d 48, 167 N. E. 2d 736, 201 N. Y. S. 2d 328 (1960) a bystander and one of defendant's companions were killed by another bystander who came to the aid of police during a tavern brawl involving gunfire. Interpreting a New York statute which was practically identical in meaning to the present Illinois statute, the Court held that the statute would support a felony-murder only where the person who did the fatal act was the felon himself.

A North Carolina case involved a bystander who was accidentally shot and killed by a man defending himself against the defendant's attack. *State* v. *Oxendine*, 187 N. C. 658, 122 S. E. 568. That Court said:

> But Walter Oxendine and (the victim who fired the fatal shot) were not acting in concert; they were adversaries, and it is the general rule that a person may not be held criminally responsible for a killing unless the homicide were either actually or constructively committed by him; and, in order to be his act, it must be committed by his own hand, or by someone acting in concept with him, or in furtherance of a common design or purpose. (122 S. E. at 570.)

In *Commonwealth* v. *Moore*, 121 Ky. 97, 88 S. Ct. 1085 (1905) where a robbery victim shot and killed a bystander, the Court held:

> Here the homicide was not committed by the conspirators, either in the pursuance of the conspiracy at all; but it was the result of action on the part of John Young,

> the proprietor of the house, in opposition to the conspiracy, and entirely contrary to the wishes and hopes of the conspirators . . . to hold them responsible criminally for the accidental death of a bystander growing out of his bad aim, would be carrying the rule of criminal responsbility for the acts of others beyond all reason. (88 S. W. at 1086.)

Several states have imposed criminal liability for the fatal acts of others where the felons use innocent persons as shields to aid in the felony or in their escape. *Keaton* v. *State*, 41 Tex. Crim. R. 621, 57 S. W. 1125 (1900); *Wilson* v. *State*, 188 Ark. 846, 68 S. W. 2d 100 (1934); *State* v. *Kress*, 105 N. J. Super. 514, 253 A. 2d 481 (1969). These cases present a very narrow exception to the general rule that there is no liability for the fatal acts of non-felons; and they rely upon reasoning which says the fatal act is the act of the felon in placing the "shield" in the path of opposition gun fire. *Johnson* v. *State*, 482 S. W. 2d 600 (Ark., 1972).

In summarizing the law of other jurisdictions, then, it can be said that if Illinois follows the rule set out by the Supreme Court in this case, it will be alone among the states in so holding. Even apparent departures such as "gun battle" cases and "shield" cases predicate liability on the act of the felon or a confederate in initiating the fatal gun fire, or in erecting the shield.

It is apparent that these petitioners are being treated by Illinois in a manner different that other States treat defendants in exactly the same circumstances.

CONCLUSION

The petitioners have demonstrated the inequality of treatment, the unequal application of law, the violation of petitioners' Federal Constitutional rights and petitioners pray that the Writ of Certiorari issue from this Honorable Court to the Supreme Court of Illinois to review that Court's opinion in the instant case.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF ILLINOIS.

Nov. 18, 1974.

No. 46071.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

vs.

GLENN HICKMAN et al.,

Appellants.

Defendants were convicted in the Circuit Court, Will County, Philip F. Locke, J., of murder, burglary, and criminal damage to property. From order arresting judgment of murder, the State appealed. The Appellate Court, 12 Ill. App. 3d 412, 297 N. E. 2d 582, reversed and remanded, and defendants appealed. The Supreme Court, Underwood, C. J., held that where defendants were fleeing from scene of burglary when officer shot and killed person carrying handgun who was later discovered to be a detective, defendants were guilty of felony-murder for death of the detective.

Judgment of Appellate Court affirmed and remanded with directions.

1. Burglary, 2

Period of time and activities involved in escaping to place of safety are part of crime of burglary itself. S. H. A. ch. 38, § 2-8.

2. Homicide, 18(3)

Where defendants were fleeing from scene of burglary when officer shot and killed person carrying handgun who was later discovered to be a detective, defendants were guilty of felony-murder for death of the detective. S. H. A. ch. 38, § 9-1(a)(3).

Thomas A. Hett, Chicago (Serpico, Stamos, Novelle, Dvorak Navigato & Hett, Ltd., Chicago, of counsel), for appellants.

William J. Scott, Atty. Gen., Springfield, and Martin Rudman, State's Atty., Joliet, for the People.

UNDERWOOD, *Chief Justice*:

A Will County circuit court jury found defendants Glen Hickman and Anthony Rock guilty of murder, burglary and criminal damage to property. A co-defendant, Robert Papes, was convicted of burglary and criminal damage to property. Thereafter the trial court entered an order arresting the judgment of murder against Hickman and Rock on the ground that in the circumstances present here the defendants could not be held liable, under the felony-murder doctrine, for the death of a police officer shot by a fellow officer during the course of police pursuit of the defendants, who were fleeing the scene of a burglary committed by them. For the offense of burglary, Hickman was sentenced to two years' probation conditioned on a nine-month term of imprisonment at the State penal farm. Rock was sentenced to imprisonment for a year to a year and one day, and Papes was sentenced to two years' probation conditioned on a six-month term at the penal farm. The State appealed the arrest of judgment on the murder verdict and the Appellate Court for the Third District reversed. (People v. Hickman, 12 Ill. App. 3d 412, 297 N. E. 2d 582.) That court, pursuant to Supreme Court Rule 316 (50 Ill. 2d R. 316), Ill. Rev. Stat. 1973, ch. 110A, § 316, granted a certificate of importance on motion of defendants Hickman and Rock.

There is no dispute as to the facts, and the sole issue presented is whether the fleeing perpetrators of a forcible felony are guilty of murder when a pursuing police officer is mistakenly shot and killed by a fellow officer also in pursuit of the fleeing felons.

On the evening of April 2, 1970, a number of members of the Joliet police force were conducting a surveillance of a liquor warehouse under the direction of Sergeant James Cronk. Between 8:30 and 9:30 p.m., Rock and Papes were observed by Sergeant Cronk and other officers driving around the immediate vicinity of the warehouses in a Cadillac automobile. A Chevrolet automobile later entered an alley adjacent to and south of the warehouse. Two persons left the car and disappeared into a doorway of the warehouse, while Papes, the driver of this auto, looked around the area. Papes then re-entered the auto and drove it down the alley out of sight. He then walked back to the warehouse and entered a side doorway. Almost immediately three persons came out of that doorway, and Sergeant Cronk signaled the officers to close in. On seeing the police, Papes, Rock and Hickman fled. Papes ran in a southwesterly direction and was immediately apprehended. He had in his hip pocket a loaded .32 caliber pistol and a box of shells. Rock and Hickman ran across a parking lot toward bushes in the northwest corner of the lot. Sergeant Erwin, who had apprehended Papes, turned his attention to the other two felons and was prepared to fire at Rock, who carried a small object in his hand, but elected to fire a warning shot in the air when Detective Loscheider came into view pursuing Rock. At the same time, Sergeant Cronk, from a vantage point at the rear of the warehouse, observed Papes being taken into custody but lost sight of the two individuals he had seen fleeing across the parking lot. Almost immediately thereafter he observed a crouched figure carrying a handgun running towards the northwest corner of the lot. Sergeant Cronk shouted "drop it," and, when the person did not comply, fired his shotgun. The running, crouched figure proved to have been Detective Loscheider, who was killed by

this shot from Sergeant Cronk's gun. Detective Loscheider, with weapon drawn, had apparently been pursuing Rock and Hickman to the point where they had gone through the bushes when he was mistaken by Sergeant Cronk for one of the burglars.

Later that evening defendants Rock and Hickman were arrested as they walked down a street some 2½ blocks from the warehouse and near a restaurant owned by Hickman. Neither was armed when arrested. Investigation disclosed that entry to the warehouse had been accomplished by removing a panel and a lock from the side door, and tool marks on the door were matched to a screwdriver found in an attache case carried by Hickman during the escape and later found in the parking lot. Other physical evidence, the automobiles involved and identifications by police officers linked all three defendants with the crime. The record discloses no evidence that either Rock or Hickman was armed.

Defendants urge that they cannot be found guilty of felony murder under these facts, because the death of Detective Loscheider was the result of a justifiable and lawful act by another police officer who was not acting in concert with the defendants nor in furtherance of their conduct. Defendants contend that in order for the felony-murder rule to be applicable, the fatal act must be done in furtherance of the forcible felony, and it must have been done by one of the co-felons. Here the death resulted from the act of a person intervening in opposition to the felony. While this narrow interpretation is arguable, based on the wording of the felony-murder statute, it is not, in our opinion, correct.

Our felony-murder statute reads as follows:

> "(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death: * * *
>
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter." (Ill. Rev. Stat. 1971, ch. 38, par. 9-1(a)(3).)

The committee comments to that section state:

> "It is immaterial whether the killing in such a case is intentional or accidental, or is committed by a confederate without the connivance of the defendant * * * or even by a third person trying to prevent the commission of the felony. People v. Payne, 359 Ill. 246, 194 N. E. 539 (1935)." S. H. A., ch. 38, sec. 9-1, at 9 (1972).

In People v. Payne, 359 Ill. 246, 194 N. E. 539, armed robbers approached the home of two brothers. One of the brothers fired a revolver attempting to prevent the robbery, and one of the robbers also fired. The second brother was killed by the gunfire, but it could not be determined whether his brother or the robber fired the fatal shot. The court affirmed the murder conviction of a conspirator who was not even present at the scene, reasoning that "It reasonably might be anticipated that an attempted robbery would meet with resistance, during which the victim might be shot either by himself or some one else in attempting to prevent the robbery, and those attempting to perpetrate the robbery would be guilty of murder. [Citation.]" 359 Ill. at 255, 194 N. E. at 543.

This court has recently re-examined the holding of *Payne* and considered its import in relation to section 9-1 of the Criminal Code of 1961, concluding that it was the intent of those who drafted the felony-murder statute to incorporate therein the holding in *Payne*. We reached this conclusion in People v. Allen, 56 Ill. 2d 536, 309 N. E. 2d 544, affirming the murder conviction of a conspirator in a proposed armored-truck robbery for the slaying of a police officer. There, too, defendant argued that the shot which caused the death of the officer had been fired by another police officer. We ruled, however, that "the defendant in this case may be held liable for the death of Officer Singleton whether the fatal shot was fired by a co-felon in the furtherance of the attempted robbery or by another police officer in opposition to the attempted robbery." (56 Ill. 2d at 545, 309 N. E. 2d at 549.) The facts in *Allen* established that

the conspirators decided to leave the scene because the armored truck had not arrived. Police vehicles blocked their departure, the conspirators began firing, and the police returned the fire. While a jury instruction in *Allen* seemed to indicate that only if the conspirators fired the initial shot and the police retaliated could defendant be held legally responsible for the death of the officer, our holding rejected that limitation.

[1] Here defendants planned and committed a burglary, which is a forcible felony under Illinois law. (Ill. Rev. Stat. 1971, ch. 38, par. 2-8.) One of them was armed. It was their conduct which occasioned the presence of the police. When confronted by approaching officers, the defendants elected to flee. We have previously held that the period of time and activities involved in escaping to a place of safety are part of the crime itself. (People v. Golson, 32 Ill. 2d 398, 207 N. E. 2d 68.) The defendants were repeatedly told to halt and the police identified themselves, but the defendants continued their attempt to escape. The commission of the burglary, coupled with the election by defendants to flee, set in motion the pursuit by armed police officers. The shot which killed Detective Loscheider was a shot fired in opposition to the escape of the fleeing burglars, and it was a direct and foreseeable consequence of defendants' actions. The escape here had the same effect as did the gunfire in *Allen,* in that it invited retaliation, opposition and pursuit. Those who commit forcible felonies know they may encounter resistance, both to their affirmative actions and to any subsequent escape. As we indicated in a recent felony-murder case, "It is unimportant that the defendant did not anticipate the precise sequence of events that followed upon his entry into the apartment of Judy Tolbert. His unlawful acts precipitated those events, and he is responsible for the consequences." People v. Smith, 56 Ill. 2d 328, 333-334, 307 N. E. 2d 353, 355.

[2] We are aware that other jurisdictions have determined that a felon is not responsible, under the felony-murder rule,

for the lethal acts of a nonfelon, with certain exceptions such as when the defendant starts a gun battle, or where a felon uses an innocent victim as a shield for escape. (See Taylor v. Superior Court of Alameda County (1970), 3 Cal. 3d 578, 91 Cal. Rptr. 275, 477 P. 2d 131; Commonwealth ex rel. Smith v. Myers (1968), 438 Pa. 218, 261 A. 2d 550.) Our statutory and case law, however, dictate a different, and we believe preferable, result. In the circumstances present here, it is clear the jury was correct in its determination that defendants Rock and Hickman were directly responsible for the death of Detective Loscheider and guilty of his murder. The appellate court correctly interpreted the felony-murder statute and the *Payne* case in reversing the arrest of judgment even without the benefit of our recent opinion in People v. Allen, 56 Ill. 2d 536, 309 N. E. 2d 544. We accordingly affirm the judgment of the appellate court and remand the cause to the trial court for further proceedings consistent with this opinion.

Affirmed and remanded, with directions.

SUPREME COURT OF ILLINOIS.

Nov. 18, 1974.

No. 44754.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

vs.

GONZALO CUEVAR AUILAR,

Appellant.

Defendant was convicted before the Circuit Court, Cook County, Robert J. Downing, J., of murder, and he took direct appeal. The Supreme Court, Ward, J., held that even if admission of defendant's confession was error on theory that Miranda requirements had not been satisfied, such error was cured and that felony-murder doctrine was applicable, contrary to defendant's assertion that he intended only to participate in a burglary or a theft and not in a crime contemplating violence.

Judgment affirmed.

1. Criminal Law, 1169.3

Generally, if accused takes witness stand and admits in substance matters contained in a confession or statement he has given to the police, he waives or renders harmless any error which may have occurred in admission of confession or statement.

2. Criminal Law, 1169.3

Even if admission of accused's confession was error on theory that Miranda requirements had not been satisfied, such error was cured where accused gave testimony corroborating confession and there was no claim that accused felt compelled to testify due to admission of confession.

3. Homicide, 18(3)

Felony-murder doctrine was applicable to accused, contrary to assertion that he intended only to participate in burglary or a theft and not in a crime contemplating violence, where accused engaged victim's attention while coparticipant went to get brick and where, after coparticipant returned with brick, which was subsequently used to strike victim, accused gave affirmative answer to coparticipant's question "Are you ready." S. H. A. ch. 28, § 9-1(a)(3).

James J. Doherty, Public Defender, Chicago (George L. Lincoln, Asst. Public Defender, of counsel), for appellant.

William J. Scott, Atty. Gen., and Bernard Carey, State's Atty., Chicago (James B. Zagel, Asst. Atty. Gen., and Patrick T. Driscoll, Jr., and John F. Brennan, Asst. State's Attys., of counsel), for the People.

[4] It follows that the failure to prove the allegation did not prejudice defendant and does not warrant reversal. People v. Taranto, 2 Ill. 2d 476, 119 N. E. 2d 221.

The People contend that the court has no jurisdiction in that the granting of Late Notice of Appeal was improvidently allowed. Because of our view of the case it is unnecessary to consider that contention.

The judgment of the Circuit Court of Peoria County is affirmed.

Judgment affirmed.

STOUDER and SCOTT, *JJ.*, concur.

APPELLATE COURT OF ILLINOIS,
Third District.

June 8, 1973.

Rehearing Denied July 10, 1973.

No. 72-32.

12 Ill. App. 3d 412

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

vs.

GLENN HICKMAN AND ANTHONY ROCK,
Defendants-Appellees.

Defendants were found guilty in Circuit Court, Will County, Philip F. Locke, J., of murder, burglary and criminal damage to property. From order arresting judgment of murder, the State appealed. The Appellate Court, Scott, J., held that where defendants were fleeing from scene of burglary when officer shot and killed person carrying handgun who was later discovered to be a detective, defendants were guilty of felony murder for death of the detective.

Reversed and remanded

1. Statutes, 217.3

Court in construing statute is not bound to consider only the wording used in the statute, it may consider the notes and reports of the commission pursuant to which the statutory provision was adopted.

2. Homicide, 18(3)

Fact that defendants were attempting to escape when detective was killed by shot fired by officer at scene of burglary was of no consequence in determining applicability of felony-murder doctrine; the period of time involved in attempt to escape was a part of the crime itself. S. H. A. ch. 38, § 9-1(a)(3).

3. Homicide, 29

Where defendants were fleeing from scene of burglary when officer shot and killed person carrying handgun who was later discovered to be a detective, defendants were guilty of felony-murder for death of the detective. S. H. A. ch. 38, § 9-1(a)(3).

Martin Rudman, State Atty., Joliet, for plaintiff-appellant.

Thomas A. Hett, Chicago, for defendants-appellees.

SCOTT, *Justice*.

Robert Bruce Papes, Anthony Rock and Glenn Hickman were indicted by the Grand Jury of Will County for the offenses of murder and burglary. After trial by jury the defendants Rock and Hickman were found guilty of the crimes of murder, burglary and criminal damage to property. Papes was found guilty of burglary and criminal damage to property but not guilty of murder. The defendants Hickman and Rock filed a motion to arrest the judgment of guilty of murder and burglary. This motion was partially granted by the trial court in that the judgment of guilty for the crime of murder was arrested.

Papes was placed on probation for a term of two years for the offense of burglary and as a term of probation was ordered to serve six months at the Illinois State Farm at Vandalia. The defendant Rock was sentenced by the trial court to a term of not less than one (1) year nor more than one (1) year and one (1) day in the penitentiary for the offense of burglary. The defendant

Hickman was placed on probation for the offense of burglary for a period of two years and as a term of probation he was ordered to serve nine months in the Illinois State Farm at Vandalia.

The State has appealed from the order of the trial court arresting the judgment of murder as to the defendants Rock and Hickman.

The factual situation which resulted in the trial of the defendants occurred on the evening of April 2, 1970, at which time seventeen policemen from the police force of the city of Joliet were participating in a surveillance of a building known as the Illinois Wine and Liquor Warehouse. Among the officers involved in the surveillance was Sergeant James Cronk, who shortly before 10:15 P.M. noticed Robert Bruce Papes and the defendant Anthony Rock pass by the warehouse several times in a Cadillac automobile. Later several officers saw a Chevrolet automobile enter an alley south of the warehouse and stop at a side door of the building. Several people left the automobile and disappeared from sight into the doorway. The driver of this vehicle, who was Papes, walked a short distance, made a surveillance of the area, returned to the automobile and then drove out of the sight of the officers. After several minutes Papes was again seen walking in the alley and after once more looking over the area he again disappeared from the sight of the police officers when he went to the location of the side doorway of the warehouse. It was within a matter of a few seconds of Papes' disappearance that Sergeant Cronk saw three individuals exit from the side doorway of the warehouse, at which time he signalled the officers to close in from various directions towards a concrete parking lot which was to the rear and west of the warehouse.

Papes and the defendants Rock and Hickman upon seeing the officers approaching them proceeded to run. Papes ran in a southwesterly direction and the defendants Rock and Hickman in a northwesterly direction towards some bushes located at the

northwest corner of the parking lot. Papes was apprehended when a Sergeant Erwin pointed a shotgun at him. Papes submitted to an arrest and upon his person was found a loaded pistol and additional cartridges. As the defendant Rock was running he was carrying a small object in his hand. The defendant Hickman was carrying an attache case as he was fleeing.

The defendants Rock and Hickman ran through the bushes while in the meantime Sergeant Cronk ran to the rear of the warehouse where he noticed two people running in a northwesterly direction. Sergeant Cronk yelled "halt—police" several times but his commands were ignored. He lost sight of the two fleeing individuals but within seconds thereafter saw a man carrying a handgun running towards the bushes at the northwest corner of the parking lot. Sergeant Cronk, believing that this approaching individual was one of the burglars of the Illinois Wine and Liquor Warehouse, and referring to the handgun, ordered the person to "drop it." When there was no compliance to this warning Sergeant Cronk fired his shotgun at the individual, who was later discovered to be Detective William Loscheider of the Joliet police force. Loscheider was killed by this shot from his fellow officer's gun.

Approximately one-half hour later the defendants Rock and Hickman were arrested as they were walking on a street approximately two and a half blocks from the warehouse. Neither of the defendants had a weapon on his person.

Subsequent to the fatal shooting of Loscheider the police officers discovered that entry to the warehouse had been made by removing a panel from the side door and also by removal of the lock from the door.

During the trial of the defendants an analyst from the Illinois Bureau of Identification Crime Laboratory testified that the tool marks found on the side door of the warehouse were made by a screwdriver found in an attache case which was discovered on the parking lot to the rear of the warehouse.

During the course of the trial the court struck from the murder count of the indictment as to the defendants Rock and Hickman all allegations as to the defendants arming themselves in furtherance of a conspiracy to burglarize the Illinois Wine and Liquor Warehouse.

The foregoing constitutes a brief summary of the unusual factual situation which led to this appeal and which presents to us the question as to whether or not the trial court erred when it entered an order arresting a judgment of guilty of murder against the defendants Rock and Hickman which had been returned against them by the jury.

More narrowly presented we must determine whether the actual shooting which caused the death of an innocent victim must have been performed by the defendants or someone acting in concert with them in order to comply with the requirements of the felony-murder doctrine.

Our criminal code contains statutory provisions relating to the felony-murder doctrine, being Ch. 38, Sec. 9-1(a)(3), Ill. Rev. Stat., which provides:

> "(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> * * * * *
>
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter."

The defendants urge an interpretation of this statute to the effect that the person who kills or performs the acts which cause death must be the same person as the one who is attempting or committing a forcible felony before liability for murder can be imposed.

[1] While the syntax of the words involved in our felony-murder statute could be interpreted on the restrictive and narrow lines urged by the defendants, we do not believe that in statutory construction we are bound to consider only the wording

used in the statute. The court in construing a statute may consider the notes and reports of the commission pursuant to which the statutory provision was adopted. (I. L. P. Statutes, Ch. 6, § 126, p. 115, see 1952 Op. Atty. Gen. 159.) Turning our attention to the committee comments in regard to the statute in question we find on page 9 of Smith Hurd Ill. Ann. Stat., Ch. 38, the following comments in regard to the application of Sec. 9-1(a)(3), the felony-murder provision:

> "It is immaterial whether the killing in such a case is intentional or accidental, or is committed by a confederate without the connivance of the defendant. * * * or even by a third person trying to prevent the commission of the felony.

In support of the committee comment that one can be guilty of murder where the killing resulted from the act of a third person trying to prevent the commission of a felony, there is cited the case of People v. Payne, 359 Ill. 246, 194 N. E. 539.

In *Payne* we have a factual situation where armed robbers entered the home of two brothers. One of the brothers discharged a weapon to prevent the robbery as did one of the robbers. The other brother was killed and it could not be determined whether he was killed by his brother or the robber. Our Supreme Court in affirming the defendant's conviction of murder stated:

> "Where several persons conspire to do an unlawful act, and another crime is committed in the pursuit of the common object, all are alike guilty of the crime committed, if it is a natural and probable consequence of the execution of the conspiracy. * * * It reasonably might be anticipated that an attempted robbery would meet with resistance, during which the victim might be shot either by himself or someone else in attempting to prevent the robbery, and those attempting to perpetrate the robbery would be guilty of murder."

There are other cases in Illinois where our reviewing courts have recognized that a defendant may be criminally responsible

for the killing of another during the commission of a forcible felony even though no certainty exists that the defendant or his cohorts performed the fatal act. See People v. Krauser, 315 Ill. 485, 146 N. E. 593; People v. Danner, 105 Ill. App. 2d 126, 245 N. E. 2d 106. Our Supreme Court in the *Payne* case, however, was confronted with a factual situation quite similar to the one presented to us in the instant case in *Payne* the court clearly adopted the theory that a defendant and co-conspirators acting in concert with him can be held responsible for a killing of an innocent third party during the commission of a forcible felony even though the killing was not actually done by a person acting in concert with the defendant or his co-conspirators.

[2] We hold it to be of no consequence that in the instant case Detective Loscheider was killed at a time when the defendants were attempting to escape. Our Supreme Court has held that the period of time involved in an escape with immediate pursuit after committing a crime becomes part of the crime itself. See People v. Golson, 32 Ill. 2d 398, 207 N. E. 2d 68. In *Golson* the court quoted language from the opinion in People v. Bongiorno, 358 Ill. 171, 192 N. E. 856, wherein it was stated:

> "* * * [W]here two or more persons engage in a conspiracy to commit robbery and an officer is murdered while in immediate pursuit of either or both of the offenders who are attempting to escape from the scene of the crime with the fruits of the robbery, each of the conspirators is guilty of murder, for the crime had not been completed at the time inasmuch as the conspirators had not won their way to a place of safety. We pointed out that a plan to commit robbery would be futile if it did not comprehend an escape with the proceeds of the crime, and that unless the plan was to kill any person attempting to apprehend the conspirators at the time of or immediately upon gaining possession of the property, the plan would be inane."

The defendants both in the trial court and in this appeal urge that the applicable law is set forth in the case of People v. Morris, 1 Ill. App. 3d 566, 274 N. E. 2d 898. In *Morris* the defendant and two cohorts entered a restaurant armed for the purpose of committing a robbery. A struggle ensued between a patron and one of the cohorts during which gunfire erupted and the cohort was killed. The defendant Morris, one of the would-be robbers, was charged with murder of his co-conspirator under the theory of the felony-murder doctrine and was convicted of the crime of murder by the trial court. The reviewing court reversed the trial court holding that the felony-murder doctrine is not applicable against a surviving felon when a co-felon is justifiably killed during commission of a forcible felony.

[3] We do not believe that the rationale of the *Morris* case is controlling in the instant case since *Morris* presented a factual situation which differed in one very significant detail. In *Morris*, unlike the case before us, the victim was not an innocent third party. In *Morris* the victim was not free from culpability but was in fact an individual who was attempting to commit a felony. We do not hold that the character of the victim is controlling merely because he was a felon, nor do we indulge in the fanciful theory that the victim being a felon assumed the risk and thereby constructively consented to his death, but we do hold that he assisted in setting in motion a chain of events which was the proximate cause of his death and therefore in the criminal law as in the civil law there is no redress for the victim.

Clearly the case of People v. Payne, 359 Ill. 246, 194 N. E. 539, and the case now before us are distinguishable from *Morris* in that unlike *Morris*, innocent parties were killed. We interpret *Payne* as setting forth the rule that he whose act causes in any way, directly or indirectly, the death of an innocent victim is guilty of murder by virtue of the felony-murder doctrine.

We are aware of the conflicting views from other jurisdictions concerning the application of the felony-murder doctrine in

cases such as we are now considering, but we are only concerned with following the law as it has been established in our own state, and therefore hold that *Payne* is controlling in the instant case and that the defendants are guilty of the crime of murder. There should be no doubt about the "justice" of holding a felon guilty of murder who engages in a robbery followed by an attempted escape and thereby inevitably calls into action defensive forces against him, the activity of which results in the death of an innocent human being.

Mr. Justice Cardozo in "The Nature of the Judicial Process", pages 66, 67, said, and we believe wisely, that "When they (Judges) are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance. * * * The final cause of law is the welfare of society."

Following the precepts of Justice Cardozo we need not extend the existing rules in order to protect society, but are only required to follow the law as set forth in the case of *Payne*. This we do and accordingly direct that the order of the trial court of Will County arresting the judgment of murder as to the defendants in this case he reversed and that further this case is remanded for sentencing of the defendants for the crime of murder.

Reversed and remanded.

ALLOY *P.J.*, and DIXON, *J.*, concur.